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TS Authority

NADA

October 22, 1962

APPRAISAL OF CUBA DEFENSIVE QUARANTINE
FROM STANDPOINT OF INTERNATIONAL LAWRight of Self-Defense Under International Law

The action taken by the United States in imposing a defensive quarantine on Cuba, so as to intercept the carriage to that country of offensive military material, has its basic justification in the right of self-defense. This right was clearly recognized in international law prior to the adoption of the Charter of the United Nations. Article 51 of the Charter has expressly preserved so much of the right to relate to self-defense against armed attack. While this article does not expressly preserve other aspects of the right of self-defense, it does not negate them. Instead, the Charter's treatment of the use of force, in self-defense and otherwise, is covered in Article 2, paragraph 4. That provision reads:

"4. All Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

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Obviously, the use of force in self-defense against armed attack is consistent with Article 51, paragraph 4. So also is use of force in pursuance of decisions or recommendations of the Security Council or General Assembly made in the exercise of their Charter powers by these two United Nations organs. It is, further, the view of the United States that a use of force judged by a Member nation and acted by an appropriate United Nations organ to be a reasonable exercise of self-defense, in circumstances not allowing for prior resort to collective action, is a lawful use, not inconsistent with the purposes of the United Nations. The immediacy of the threat posed by the secret establishment of long-range nuclear missile bases in Cuba required immediate measures on the part of the United States to safeguard its own security and that of all other countries of the Western hemisphere. It is also to be observed that the measures of quarantine undertaken by the United States are moderate and limited in character, and carefully proportioned to deal precisely with the threat that gave rise to them.

Action by a Regional Arrangement or Agency

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Apart from this basic justification under international law and the Charter of the United Nations, there is to be

considered the effect of action by a regional arrangement or agency. Such action is contemplated by Article 52 of the Charter. Article 52, paragraph 1, reads as follows:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Action covered by the scope of this provision is clearly not prohibited by the general principle set forth in Article 2, paragraph 4.

The United States considers that the resolution of the Organ of Consultation calling for a defensive quarantine of Cuba comes within the scope of action appropriate to a regional arrangement or agency under Article 52. We entertain no doubt that the security arrangements of the Inter-American system are fully consistent with the purposes and principles of the United Nations. This emerges quite clearly from the negotiating history of the Charter, in the course of which attention was directed at the relationship between the Inter-American system and the United Nations.

Enforcement Action and the Requirement of Security Council Authorization Under Article 52

The contention has been raised that the action of

quarantine provided for in the Charter. The Organ of Consultation constitutes a body which is not within the meaning of Article 50, paragraph 1, of the United Nations Charter, and therefore requires the authorization of the Security Council. With this the United States has already disagreed.

Twice before the Security Council has had occasion to consider the import of "enforcement action" as used in Article 50 of the Charter. In September, 1948, the Council met to consider an allegation by the Soviet Union that a decision of the Organ of Consultation to take certain diplomatic and economic measures against the Government of the Dominican Republic constituted "enforcement action". The Security Council did not accept that allegation. Earlier this year, Cuba asked the Security Council to consider decisions taken by the Dominican Republic at Punta del Este, claiming that they required Security Council authorization. Again the Council disagreed. Thus, the history of United Nations practice has so far not pointed to affirmative conclusions as to what constitutes "enforcement action". During the previous debates, delegates pointed out that the meaning of the term was far from clear.

In the view of the United States, action by a regional arrangement or agency which is recommendatory in character, and not legally binding, cannot constitute "enforcement action" under Article 53. Let us consider now the character of the Organ of Consultation resolution calling for a defensive quarantine.

The resolution in question flows from the authority conferred in Article 6 of the Rio Treaty. This Article provides that "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by...any...fact or situation that might endanger the peace of America", the Organ of Consultation shall agree on "the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent". Article 3 of the Treaty specifies "use of armed force" as one of the measures on which the Organ of Consultation may agree. Article 20 specifies that "use of armed force", alone among the measures specified in Article 8, is not binding on all the parties to the Treaty, and "no state shall be required to use armed force without its consent." Thus, the resolution adopted by the Organ of Consultation on

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October 23 was recommended, and not obligatory.

The expression "enforcement action" appears at several places in the Charter in addition to Article 53. For example, Article 2, paragraph 5 obligates the Members of the United Nations to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action". And Article 5 provides that "A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council."

The "preventive" and "enforcement" action mentioned in these articles refers to action which the Council is authorized to take under Articles 40, 41, and 42. Article 40 provides for the taking of "preventive action" in the form of provisional measures which are orders of the Council binding on Member States. Articles 41 and 42 empower the

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Council to enforce its decisions by calling upon United Nations Members to apply certain measures or by taking action directly through air, sea, or land forces which are at the disposal of the Security Council. Article 45 contains a further reference to national air-force contingents which shall be held immediately available "for combined international enforcement action." In acting under Articles 40, 41, and 42, the Council does more than recommend. It makes binding decisions and it gives direct orders of enforcement.

This character of the Council's actions under Articles 40, 41, and 42 is to be distinguished from recommendations made by the Security Council under Article 39 or by the General Assembly in the discharge of its responsibilities as set forth in Chapter IV of the Charter. In the exercise of its powers under Articles 10 and 11, the General Assembly has in the past recommended the use of armed force, despite the contention made long ago that such a measure constituted "action" which could only be taken by the Security Council. Since the Assembly's powers are only recommendatory in the field of peace and security, the Assembly does not take either "preventive" or "enforcement" action.

This distinction between a Security Council measure which is obligatory and constitutes "action", on the one hand, and a measure which is recommended either by the Council or by the General Assembly on the other, has been alluded to by the International Court of Justice in its Advisory Opinion of July 20, 1962 concerning "certain expenses of the United Nations" (Article 17, paragraph 2, of the Charter). The Court's opinion said:

"The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. If the word 'action' in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action."

Thus, in the context of United Nations bodies,

"enforcement action" means action by a United Nations body

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which is obligatory on all the Members. In considering the character of measures taken by a regional organization, it is reasonable to apply a comparable standard in interpreting and giving effect to the term "enforcement action" as it appears in Article 53, paragraph 1 of the Charter. We have seen from Article 20 of the Rio Treaty that a decision on the use of armed force is not obligatory on all parties to the Treaty; in accordance with that Article, a resolution by the Organ of Consultation on "use of armed force" is recommendatory only. Thus it would not constitute "enforcement action" under Article 53, paragraph 1.

In considering the compatibility with the United Nations Charter of the resolution adopted by the Organ of Consultation, it is instructive to consider the opening provision of Chapter VIII of the Charter, on regional arrangements.

Article 52, paragraph 1, reads as follows:

"Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

This language appeared originally in the Dartmouth Oaks text submitted by the Four Powers which sponsored the

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San Francisco Conference. In the interim, the American Republics, at a Conference attended by all of them in Mexico City, approved the Act of Chapultepec. Part II of that Act recommended as follows:

"That for the purpose of meeting threats or acts of aggression against any American Republic following the establishment of peace, the Governments of the American Republics consider the conclusion, in accordance with their constitutional processes, of a treaty establishing procedures whereby such threats or acts may be met by the use, by all or some of the signatories of said treaty, of any one or more of the following measures: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; breaking of postal, telegraphic, telephonic, radio-telephonic relations; interruption of economic, commercial and financial relations; use of armed force to prevent or repel aggression."

It will be observed here that the language of this recommendation corresponds very closely with the provisions later incorporated in Articles 6 and 8 of the Rio Treaty. Part III of the Act of Chapultepec went on to state:

"The above Declaration and Recommendation constitute a regional arrangement for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action in this Hemisphere. The said arrangement, and the pertinent activities and procedures, shall be consistent with the purposes and principles of the general international organization, when established."

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Thus, the American Republics meeting in Mexico City gave their judgment that measures including the use of armed force to prevent or repel aggression" constituted "regional action" which might appropriately be taken by a regional arrangement.

When Article 52 was debated in Committee 3/4 at the San Francisco Conference, the Chairman of the Committee, speaking as the Representative of Colombia, made the following statement concerning the relationship between the Inter-American system and Chapter VIII of the United Nations Charter:

"The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter."

Although one member of the Committee stated that his delegation had not considered or studied the Act of

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Chapultepec, no delegate disputed the Colombian statement.

Indeed, the United States Representative, near the end of the discussion, said that "his delegation entertained no doubt whatever that the Act of Chapultepec as implemented by the treaty soon to be drawn up [the Rio Treaty] would pass every test required by the new international organization as a tremendous keystone contribution to the great undertaking to which we are now dedicating our hearts and souls."

In considering what "enforcement action" means, as it appears in Article 53, it is relevant to consider what basic purposes that Article can best be expected to serve. There was general recognition at San Francisco that regional organizations had an important role to play in the maintenance of international peace and security, particularly with respect to disputes within a region. Members of the Inter-American system emphasized their view that that system could best cope with the internal problems of the Western hemisphere. The importance of regional organizations found expression in several articles of the Charter.

At the same time, it was clear that actions of regional organizations, particularly if they involved organized hostilities or were directed at states not members of the

regional organization, could have a serious effect on the peace and security of the rest of the world. As events have unfolded in the last 17 years, it has become evident that regional arrangements operate in fact as a restraint on the actions of their individual members. In part this results from built-in political checks upon action. The Rio Treaty, for example, requires a two-thirds majority for measures designed to maintain international peace and security.

How do the steps authorized by the resolution of the Organ of Consultation relate to the provisions of the Charter, as amplified by seventeen years of growth and history? The action which is being taken relates to a regional matter. Cuba is a party to the Rio Pact, which authorizes precisely the measures now being taken. These measures have, as their purpose, the protection of hemispheric peace and security. The resolution is carefully drawn. It call for an action of quarantine to prevent the carriage to Cuba of military materiel contributing to an offensive nuclear missile capability. The quarantine is to protect and defend the countries of the Western hemisphere against nuclear surprise attack. It is not designed to enforce any social or political changes upon and within Cuba.

TRANSCRIBED PAGES FOLLOW

(Pages One to Four)

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FROM STANDPOINT OF INTERNATIONAL LAW

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"4. All members shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Obviously, the use of force in defense against armed attack is consistent with Article 2, Paragraph 4. So also is use of force in pursuance of decisions or recommendations of the Security Council or General Assembly made in the exercise of their Charter powers by these two United Nations organs. It is, further, the view of the United States that a use of force judged by a Member nation and later by an appropriate United Nations organ to be a reasonable exercise of self-defense, in circumstances not allowing for prior resort to collective action, is a lawful use, not inconsistent with the purposes of the United Nations. The immediacy of the threat posed by the secret establishment of long-range nuclear missile bases in Cuba required immediate measures on the part of the United States to safeguard its own security and that of the other countries of the Western Hemisphere. It is also to be observed that the measures of quarantine undertaken by the United States are moderate and limited in character, are carefully proportioned to deal precisely with the threat that gave rise to them.

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Action covered by the scope of this provision is clearly not prohibited by the general principles set forth in Article 2, paragraph 4.

The United States considers that the resolution of the Organ of Consultation calling for a defensive quarantine of Cuba comes within the scope of action appropriate to a regional arrangement or agency under Article 52. We entertain no doubt that the security arrangements of the Inter-American system are fully consistent with the purposes and principles of the United Nations. This emerges quite clearly from the negotiating history of the Charter, in the course of which attention was directed at the relationship between the Inter-American system and the United Nations.

"Enforcement Action" and the Requirement of Security Council Authorization under Article 13

The contention has been raised that the action of

quarantine provided for in the resolution of the Organ of Consultation constitutes "enforcement action" within the meaning of Article 53, paragraph 1, of the United Nations Charter, and therefore requires the authorization of the Security Council. With this, the United States emphatically disagrees.

Twice before the Security Council has had occasion to consider the import of "enforcement action" as used in Article 53 of the Charter. In September 1960, the Council met to consider an allegation by the Soviet Union that a decision of the Organ of Consultation to take certain diplomatic and embargo measures against the Government of the Dominican Republic constituted "enforcement action." The Security Council did not accept that allegation. Earlier this year, Cuba asked the Security Council to consider decisions taken by the American Republics at Punta del Este, claiming that they required Security Council authorization. Again the Council disagreed. Thus, the history of United Nations practice has so far not yielded affirmative conclusions as to what constitutes "enforcement action." During the previous debates, delegates pointed out that the meaning of the term was far from clear.